Supreme Court, U. S.
FILED
JUL 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, etc., *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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vs.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

This is Respondents' brief in opposition to a petition for writ of certiorari to the Court of Appeal of the State of California, Fourth District, Division Two. The judgment of the Court of Appeal was rendered on March 11, 1977, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), affirming the judgment of the Superior Court of Orange County in case No. 228389, filed February 4, 1976, an unreported judgment.

Jurisdiction.

Respondents respectfully submit that Petitioners' allegation of jurisdiction under the provisions of 28 U.S.C. Section 1257(3) is unfounded and that in fact

this Court has no jurisdiction to review the instant case. Respondents' reasons for asserting a lack of jurisdiction are set forth in Section I of the Argument, *infra*.

Constitutional Provisions and Statute Involved in This Case: Pertinent Parts.

I

Constitutional Amendments.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment I.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Amendment XIV.

II

Statute of the United States.

"Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

". . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

June 25, 1948, c. 646, 62 Stat. 929;
28 U.S.C. §1257(3) (1970).

Questions Presented.

1. When an unsuccessful party in a state intermediate appellate court fails to timely petition for a discretionary hearing in the highest court of the state, and that court declines to relieve the party from its default, does the decision of the intermediate appellate court constitute a judgment rendered "by the highest court of the state in which a decision could be had", allowing this Court to exercise jurisdiction pursuant to Title 28, Section 1257(3) of the United States Code?

2. Did the state appellate court correctly apply this Court's interpretation of the establishment clause of the First Amendment to the United States Constitution in concluding that a public school district could not sponsor a student religious club organized for the purpose of enabling its members "to know God better

so that they will be better persons . . . by prayerfully studying the Bible"?

3. Did the state appellate court correctly apply the decisions of this Court interpreting the establishment clause and free speech clause of the First Amendment to the United States Constitution in concluding that Respondent School District's action in refusing to recognize and sponsor a religious club did not infringe upon potential club members' First and Fourteenth Amendment rights?

Statement of the Case.

By Complaint filed in Orange County Superior Court, Petitioners prayed for a judgment declaring their right to have a Bible study club recognized and sponsored at Edison High School, located within Respondent District, and a judgment enjoining the Respondents from denying Petitioners recognition of their club and use of the high school facilities as granted to other student organizations pursuant to district rules and regulations. 68 Cal. App. 3d at 8. The matter was heard pursuant to a stipulated statement of facts. 68 Cal. App. 3d at 6. A judgment was entered decreeing that the Respondents were prohibited from recognizing Petitioners' Bible study club or from assisting Petitioners in their efforts to form a religious club under the First Amendment of the United States Constitution and that the school's refusal to recognize and sponsor the club did not violate Petitioners' free exercise guarantees under the same First Amendment. 68 Cal. App. 3d at 8.

Petitioners appealed to the Court of Appeal of the State of California, Fourth Appellate District, which affirmed the judgment in a two to one decision, 68

Cal. App. 3d 1, and denied a petition for rehearing. [See Appendix B to the Petition.]

A petition for hearing before the California Supreme Court was submitted for filing on April 21, 1977, pursuant to California Rules of Court, Rule 28(b), together with a request to be relieved from default for failure to timely file the petition pursuant to California Rules of Court, Rule 45(e). [Pertinent parts of the Rules of Court are attached hereto as Appendix A.] The application for relief from default was denied and the petition returned for failure to comply with Rule 28(b) as evidenced by Appendix C to the Petition. Contrary to Petitioners' jurisdictional statement, the Supreme Court of California never "denied hearing" on this cause, but merely refused to allow an untimely petition to be filed.

Having failed to file a timely petition for hearing, Petitioners requested that the California Supreme Court transfer the matter to itself for hearing and decision on its own motion pursuant to California Rules of Court, Rule 28(a). [Appendix D to the Petition.] Contrary to the assertion in the Petition, the state's supreme court did not "ignore" this request, but treated it as another request for relief from default under Rule 45(e) and again declined to grant such relief without ruling on the petition.[1] [Appendix E to the

[1]Although entitled "Petition Requesting Court to Grant Hearing on its own motion, pursuant to California Rules of Court, Rule 28(a)," the California Rules of Court make no provision for such a "petition". It is undisputed that the state supreme court could have heard the cause on its own motion regardless of whether the petition was submitted late or never filed at all. Petitioners' failure to timely petition the court did not deprive the Supreme Court of its power under Rule 28(a), *Hygienic Health Food Company v. Grant*, 188 Cal. 131, 204 Pac. 389, (1922), but the California Supreme Court failed to make the necessary motion.

Petition.] Therefore, Petitioners were never denied a hearing in the California Supreme Court; they failed to timely seek one.

The undisputed facts upon which the challenged decision is based are as follows:

Respondent Huntington Beach Union High School District is a public, tax-supported school district, responsible for high school education within its geographic jurisdiction and is the owner of and has control over the Edison High School.

Petitioners are or were students of the Edison High School who submitted an application for recognition of a student club whose purpose was "to enable student members to know God better so that they will be better persons and to accomplish this by prayerfully studying the Bible" and whose membership would be open only to those who "have a genuine interest in the fulfilling of the purpose of this organization." The application which was accompanied by a club charter was denied by the high school principal and subsequently by the District Board of Trustees. The Bible referred to was the sixty-six books collectively referred to as the "Old and New Testaments". It is significant that with the exception of the application for recognition of the specific club described in the charter, the Petitioners did not seek and were not denied any use of rooms or other space at Edison High School. 68 Cal. App. 3d at 6-8.

Pursuant to the California Education Code, the Board of Trustees and administration of Respondent District had enacted rules and regulations permitting and governing student clubs on the high school campus. Board Policy No. 5144 provides:

> "Clubs recognized by the Board of Trustees are those which are sponsored by the individual schools in the District." 68 Cal. App. 3d at 6 n.2.

Those clubs which are sponsored by the individual schools are governed by Staff Rule No. 5144. That rule provides that "clubs recognized by the individual school be sponsored by the school. These clubs must be directly responsible to the school." It further provides that club charters "must be approved by the associated students' governing body and by the principal of the school." The organization must:

"(1) Be sponsored by a member of the faculty appointed by the principal;

"(2) Deposit all monies collected and check out all monies through the school's financial secretary according to school regulations. All club accounts shall be audited.

"(3) Have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings.

"(4) Request and receive approval from the school principal for special social events."

A school-sponsored club is permitted to:

"(1) Use official name of the school.

"(2) To use buildings and other facilities.

"(3) To have publicity in daily bulletins, bulletin boards and school publications.

"(4) To wear an identifying emblem, but not special clothing.

"(5) To sell on school premises tickets or bids to special activities sponsored by the club."

Additional provisions require that the associated students' governing body and the principal approve any deviations from the requirements set forth in the staff rule and that the principal be obligated to insure that the clubs are not of a secret nature and are not in any way selective or discriminatory. 68 Cal. App. 3d at 6-7 n.3.

The District has not allowed religious clubs on campus except for a short period between January 8, 1974, and June 25, 1974, pursuant to a Board resolution which was rescinded under advice from the Orange County Counsel's office, which was acting as legal counsel for the District at the time. 68 Cal. App. 3d at 7-8.

Petitioners or other religious groups are free to apply for the use of school facilities under the California Civil Center Act, and rules and regulations adopted by the District, provided that such religious use does not interfere with the regular school day and is paid for. 68 Cal. App. 3d at 7 n.4.

Summary of Arguments.

In seeking to obtain a writ of certiorari directed to an intermediate state appellate court, Petitioners have failed to comply with the jurisdictional requirement of Section 1257 of Title 28 of the United States Code, limiting this Court's review to final decisions of the highest court of the state in which a decision could be had. Petitioners simply failed to timely petition for a hearing in the California Supreme Court and are seeking to bootstrap their way into this Court on the basis that the California Supreme Court determined that their failure to timely file a petition was

not justified by good cause and failed to take the matter up on its own motion. Such arguments are clearly contrary to the policy of the statute, and to Court decisions applying the statute.

Respondents also contend that there is abundant precedent from this Court setting forth proper construction of the establishment clause of the First Amendment to the United States Constitution in the context of public school sponsorship of religious activities and that that precedent was properly applied by the California Court of Appeal for the Fourth District in the instant matter. Moreover, there is an equal abundance of Court interpretation of that part of the First Amendment relating to freedom of speech and association which was likewise appropriately applied by the California Court of Appeal in determining that the School District did not unlawfully abridge any rights of petitioners in denying school sponsorship of their religious club.

ARGUMENT.

I

Petitioners Failed to Timely Petition for a Discretionary Hearing in the California State Supreme Court and Therefore Failed to Meet the Jurisdictional Requirement That a Decision Be the Decision of the Highest Court of the State in Which a Decision Can Be Had.

Section 1257 of Title 28 of the United States Code provides in relevant part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows:
>
> ". . .
>
> "By Writ of Certiorari . . ."

That the highest state court requirement is jurisdictional is well-established. See, *e.g., Fisher v. Perkins,* 122 U.S. 522, 30 L.Ed. 1192, 7 S.Ct. 1227 (1887); *Stratton v. Stratton,* 239 U.S. 55, 60 L.Ed. 142, 36 S.Ct. 26 (1925); *Gotthilf v. Sills,* 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187 (1963). The decision of an intermediate court will not be considered the decision of the highest state court unless the petitioning party has exhausted the necessary efforts to obtain such review as is available by right or discretion. See, *e.g., Gregory v. McVeigh,* 90 U.S. 294 (23 Wall) (1875); *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Fisher v. Perkins, supra; Stratton v. Stratton, supra; Gotthilf v. Sills, supra.*

In *Fisher v. Perkins, supra,* this Court required that the denial of a hearing in the highest court appear on the record in order to qualify the intermediate

court judgment for review. The Court noted at page 523 of the opinion:

> "It certainly would not be claimed that a judgment of the Superior Court could be reviewed by this Court . . . before an application had been made *in proper time* for the allowance of an appeal. . . ." (Emphasis added.)

In rejecting the petitioner's argument that his petition for appeal would not have been granted because he did not obtain the proper certificate from the superior court, this Court noted at the same page:

> "Want of the certificate is good reason for refusing to allow an appeal; but until it has been asked and refused, its absence furnishes no grounds for a writ of error from this Court. . . . We find nothing in the record to show that this suit could not have been taken to the court of appeal if the necessary application had been made, and consequently we have no right to proceed. . . . We are not to assume that an appeal would not have been granted if applied for. The record must show its refusal."

The importance of correctly pursuing the right of higher state court review was emphasized by this Court in *Gotthilf v. Sills, supra,* wherein a petition for certiorari was dismissed as being improvidently granted when it appeared that the matter was not heard in the highest state court because the party had improperly appealed his decision rather than having the question certified as required by state law. This was true even though the state remedy apparently was not altogether clear. See 375 U.S. at 81, Douglas, J. dissenting.

The importance of making proper and timely application is emphasized by those cases wherein an intermediate court's decision was accepted as the decision of the highest court of the state in which a decision could be had. In *Gregory v. McVeigh, supra,* the Court stated at page 306:

> "If a cause cannot be taken to the highest court of the state, except by leave of the court itself, a refusal of the court *upon proper application made* to grant the leave . . . may be made the basis of proceedings under the appellate jurisdiction of this Court." (Emphasis added.)

In *Gregory,* petitioner had properly presented his petition. The Court went on to note:

> "Thus the doors of the court of appeal had been forever closed against this suit; *not through neglect, but in the regular order of proceeding under the law governing the practice.*" (Emphasis added.)

Similarly, in *Douglas v. California, supra,* this Court considered the decision of a California District Court of Appeal as the decision of the highest court of the state only after petitioner's petition for discretionary review in the California Supreme Court had been denied. See 372 U.S. at 354 n.1.

Although entitled to petition the California Supreme Court for a hearing, pursuant to Court Rule 28(b) [see Appendix A], Petitioners failed to make a timely application. Pursuant to Rule 46 the Petition could not be filed. Therefore there was no petition for hearing ever filed in the California Supreme Court and no record of a hearing being denied, as required by this Court in *Fisher v. Perkins, supra.*

Petitioners seek to circumvent the requirement by asserting that the California Supreme Court's refusal to relieve them from their default to timely file as permitted by Court Rule 45(e) is equivalent to a denial of a petition for hearing. As evidenced by the statement of the state supreme court to petitioners attached to the Petition as Appendix B, that court merely determined that the miscalculation of time for filing a petition was not good cause for relief from the ten-day filing requirement. *It was not a denial of a hearing on the petition, but a denial of the right to file an untimely petition.* Clearly, petitioners' neglect does not even begin to reach the level of justification which this Court nonetheless rejected in *Gotthilf v. Sills, supra.* Of course, under established precedent this Court will not second-guess what action the California Supreme Court might have taken had a proper petition been presented. *Stratton v. Stratton, supra.*

Petitioners also seek to excuse their neglect and failure to properly petition the state supreme court on the basis that Court Rule 28(a) permits that court to transfer the matter to itself for hearing on its own motion. There is no basis in fact or law, however, for the conclusion that the failure of a court to act on its own motion constitutes a decision of the court. Such a conclusion would result in the anomalous situation of every intermediate California appellate court decision becoming the decision of the highest state court in which a decision could be had for Supreme Court jurisdictional purposes, even when no petition is presented to the state supreme court. It would impose upon the California Supreme Court the impossible burden of anticipating those important public questions which should first be decided by it before being pre-

sented to this Court. Furthermore, it would not further the statutory policy as recognized by this Court of requiring the party seeking review in this Court to exhaust all state court remedies. Under established precedent, petitioners have the duty of insuring that every opportunity for review in the highest state court is pursued, and failure to do so will preclude this Court from taking jurisdiction of the matter.

Petitioners carry the burden of demonstrating that they in fact have taken the matter to the highest state court possible, *Gorman v. Washington University*, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 926 (1942), and have not met that burden. The Writ should therefore be denied on jurisdictional grounds.

II

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Approval and Sponsorship of Petitioners' Bible Study Club by a Tax Supported High School Is Prohibited by the Establishment Clause of the First Amendment of the United States Constitution.

The First Amendment of the United States Constitution provides in relevant part:

> "The Congress shall make no law respecting an establishment of religion."

This prohibition is incorporated in the due process clause of the Fourteenth Amendment and is applicable to and binding upon the states. See, *e.g., Engel v. Vitale*, 370 U.S. 421, 479, 8 L.Ed.2d 601, 82 S.Ct. 1261 (1962); *Abington School District v. Schempp*,

374 U.S. 203, 217, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).

In applying this particular provision, this Court has determined that the prohibition against establishment and interference with the exercise of religion contained in the First Amendment is absolute. *Zorach v. Clauson*, 343 U.S. 306, 311, 96 L.Ed. 954, 72 S.Ct. 679 (1951).

In *Abington School District v. Schempp, supra*, at pages 217-218, the majority noted that the Amendment comprehensively forbade "*every form* of public aid or support for religion" and precluded the state from undertaking or sustaining religious training, teaching, or observance "in any form or degree". As noted by Justice Brennan in his separate concurring opinion at page 299:

> "If the state must be steadfastly neutral in all matters of faith and neither favor nor inhibit religion, in my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality."

Over the past thirty years the First Amendment establishment clause has been the subject of many decisions in this Court. For example, in *Everson v. Board of Education*, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504 (1947), Justice Rutledge gave a thorough historical treatment of the evolution of the establishment clause in his frequently referred to dissent.

Two of those cases, referred to by Petitioners and of great interest to the present action are: *McCollum v. Board of Education*, 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461 (1947), and *Zorach v. Clauson, supra.* (The current viability of both cases was recently recognized by the Fourth Circuit Court of Appeals in *Smith*

v. Smith, 523 F.2d 121, 123 (4th Cir. 1975). See also *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 771, 37 L.Ed.2d 948, 93 S.Ct. 2955 (1973).)

In *McCollum,* private religious groups employed religious teachers to come weekly into the school buildings, during the normal school day and for a period of thirty minutes substituted their religious teaching for secular education. The two factors which led the Court to conclude that the practice violated the First Amendment were the use of school buildings and the fact that the religious education occurred during the compulsory school day, *i.e.,* a time when students were required to be on campus. Mr. Justice Black, speaking for the majority of the Court, stated at page 212 of the opinion:

> "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."

In an opinion concurred in by three other members of the Court, Mr. Justice Frankfurter went on to note that released time programs, where students were released for a period of time from their normal secular activities in order to pursue religious training, required "close judicial scrutiny". In a footnote he enumerated the various factors which must be looked into including "the extent to which school property and administrative machinery [were] involved." 333 U.S. at 225 n.17.

Subsequently, in *Zorach,* this Court held that a release time program where students were released during a school day so that they may "leave the school buildings and school grounds and go to religious centers for religious instruction or devotion exercises" did not violate the establishment clause of the First Amendment. 343 U.S. at 308. *McCollum* was distinguished on the basis that public classrooms were not used. The Court noted at pages 308-309 of the opinion:

> "This 'released time' program involves neither religious instruction in public classrooms nor the expenditure of public funds. All costs, including the application blanks are paid by the religious organizations. The case is therefore unlike *Illinois ex rel. McCollum vs. Board of Education,* 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, 2 ALR 2d 1338, which involved a 'released time program' from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment, which (by reason of the Fourteenth Amendment) prohibits the state from establishing religion or prohibiting its free exercise."

The majority opinion went on to note at page 314:

> "But [government] can close its doors or suspend its operations as to those who want *to repair to the religious sanctuary for worship or instruction. No more than that is undertaken here.*" (Emphasis added.)

As noted by Mr. Justice Black in comparing the *Zorach* facts to the *McCollum* facts:

> "Except for the use of the school buildings in Illinois, there is no difference between the systems

which I consider even worthy of mention." 343 U.S. at 316, Black, J. dissenting.

In their Petition, Petitioners attempt to minimize the fact that school buildings were actually used in *McCollum* and assert that *Zorach* is controlling in the instant case. In so doing Petitioners ignore the cited language from *Zorach* and the substantial similarity between the *McCollum* facts and the instant action. In addition, Petitioners rely on the concurring opinion of Mr. Justice Brennan in *Abington School District v. Schempp, supra,* and several recent inapposite lower court decisions.

Petitioners fail to point out that the majority in *Schempp* noted that the exercises which were proscribed by the First Amendment in that case "were part of the curricular activities of the students who were required by law to attend school" and were "held in the school buildings under the supervision and with the participation of teachers employed in those schools." The Court noted at page 223 of the opinion:

> "None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson.*"

Under California law, Respondents are responsible for the conduct and activities of students from the time they arrive at school in the morning until the time they leave. This supervisory responsibility includes the noon hour and activities on campus both before and after class instruction. See, *e.g.*, 5 California Administrative Code Section 5552, California Education

Code Sections 44814 and 44807;[2] *Taylor v. Oakland Scavenger Co.*, 17 Cal. 2d 594, 110 P.2d 1044 (1941); *Cieglar v. Santa Cruz High School Dist.*, 168 Cal. App. 2d 277, 284, 355 P.2d 709 (1959). (It should be noted that non-teachers who supervise students during the noon hour under Education Code Section 44814 are employed to do so. See 35 Ops. Cal. Atty. Gen. 109, 111, and California Education Code Section 42200, which provides for additional school taxes to pay such supervisorial employees.) It is during this period of school responsibility that Petitioners request that they be granted the right to "prayerfully study the Bible". Petitioners' demands for club sponsorship include not only use of school facilities but also faculty supervision. The Bible Study Club is to be a part of the regular school "extracurricular" activity program and activities and study will be so positioned as to make it a part of or an extension of the regular school day and thereby take advantage of student presence on campus mandated by compulsory education attendance laws. See California Education Code Section 48200. If Petitioners had been granted the relief requested, they would also have been able to "use the official name of the school", to publicize their religious activities on bulletin boards and in school publications and to sell tickets on school premises to special activities spon-

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[2]Since the decision of the California District Court of Appeal, the California Education Code was reenacted and renumbered. Therefore, the references in this brief are to the new Code. It should be noted, however, that none of the sections cited by the state appellate court were substitutively altered.

sored by the club. 68 Cal. App. 3d at 6-7 n.3. The school would be involved in monitoring all monies obtained by the club and approving any special social functions that the club might have. 68 Cal. App. 3d at 6-7 n.3; see also California Education Code Sections 48930 *et seq*. Clearly, the involvement exceeds that which was held impermissible by this Court in both *Schempp* and *McCollum*. There is a world of difference in Petitioners' request in the instant action to study religion *on campus* during lunch hour and an extension of the school day and under school supervision and leaving campus for religious instruction during the school day which was held permissible by this Court in *Zorach*.

The decisions of lower federal courts referred to by Petitioners in their Petition as a limitation on *McCollum* are also distinguishable. For example, in *Wood v. Mt. Lebanon Township School District*, 342 F.Supp. 1293 (W.D. Pa. 1972), the court noted in permitting prayers at a graduation ceremony that the graduation ceremony follows and *is completely separate and apart from all formal requirements of the school district for graduation, and was not part of the day-to-day school activity*. 342 F.Supp. at 1294. Moreover, the court noted that the ceremonies were "totally separate from school routine" and were in no way connected with the school *nor approved by* the school.

In *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965), the court attempted to set forth the type of religious activity on a school campus that would be permissible. In attempting to permit some type of pre-school and post-school religious activity, the court specifically recognized at page 54 that:

> "Those who do take the opportunity to participate in the program must be separate from the official activity of the school, as of course must be the program itself."

There was no question of school sponsorship of a club. The court further noted that it would have to closely monitor the undertaking and might ultimately have to take testimony to determine whether the program could be satisfactorily applied in order to avoid establishment clause problems. 237 F.Supp. at 57. (The decision does nothing more than deny a preliminary injunction and establish guidelines to be applied during the pendency of the lawsuit.)

In *Stacey v. William*, 306 F.Supp. 963 (N.D. Miss. 1969), the court was concerned with the right of a university organization to invite an outside speaker to address its members on a religious theme. See 306 F.Supp. at 975-976. In *Stacey* there was no question of school sponsorship of a particular religious club with a particular religious affinity or affiliation with certain books of the Old or New Testament.

In attempting to distinguish *McCollum* and to rely on *Zorach*, Petitioners have not analyzed the recent case of *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975), wherein the Fourth Circuit Court of Appeal held that a major distinction between *Zorach* and *McCollum* was the use of classrooms. The court noted therein at page 123:

> "The majority opinion by Mr. Justice Douglas in *Zorach* offered three possible distinctions between this program and the one invalidated in *McCollum*. The *Zorach* program provided [1] 'neither religious instruction in public school class-

rooms, [2] nor the expenditure of public funds.' 343 U.S. at 308-09, 72 S.Ct. at 681. In *McCollum*, on the other hand, 'the classrooms were used for religious instruction and [3] the force of the public school was used to promote that instruction.' 343 U.S. at 315, 72 S.Ct. at 684. The second and third distinctions seem, in fact, to depend on the first and crucial distinction; in *McCollum*, the public school turned its classrooms over to the religious instructor; in *Zorach*, the schools only adjusted 'their schedules to accommodate the religious needs of the people'."

It is the use of public school classrooms which is precisely what Petitioners desire to have. As noted, this use would be during normal hours when the school would be used for school purposes and under the direction or supervision of school personnel.

An application of *McCollum, Schempp* and *Zorach* to the facts in the instant action clearly compelled the California appellate court conclusion that the relief requested by Petitioners would violate the establishment clause of the First Amendment of the United States Constitution based upon the facts set forth in the opinion. This conclusion is buttressed by a review and application of the tripartite test most recently used by this Court in disposing of establishment clause cases.

The test is set forth in *Meek v. Pittenger*, 421 U.S. 349, 358, 44 L.Ed.2d 217, 227, 95 S.Ct. 1753 (1975), as follows:

"First, the statute must have a secular legislative purpose. Eg., *Apperson vs. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266. Second, it must have a 'primary effect' that neither ad-

vances nor inhibits religion. E.g., *School District of Abington Township vs. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560. Third, the statute and its administration must avoid excessive government entanglement with religion. E.g., *Walz vs. Tax Commission*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1407."

The application of the test is often a matter of degree and must be strictly based on the particular facts of the case before the court. *Walz v. Tax Commission*, 397 U.S. 664, 669, 674, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970); see also *Meek v. Pittenger supra* at 359.

Sponsorship of Petitioners' Bible Study Club by a public school district would violate all three tests.

A. The Purpose of a Religious Club.

Respondent High School District is a creation of the California State Legislature pursuant to Article IX of the California Constitution and Education Code Sections 35000 *et seq*. Its primary purpose is to provide education and it cannot act beyond the scope of authority vested in it. The fact that clubs are to further the educational purpose or objective of Respondent is evidenced by Staff Rule 5144, which requires a faculty sponsor "appointed by the principal". 68 Cal. App. 3d at 6-7 n.3. Moreover, Education Code Section 48930, which permits student organizations, provides in relevant part:

". . . any such organization shall have as its purpose the conduct of activities *on behalf of the students* approved by the school authorities and *not in conflict with the authority and responsibility*

of the public school officials. . ." (Emphasis added.)

Hence, either directly or indirectly, any student organization such as Petitioners' club should further the basic responsibility of the public school officials, *i.e.*, education. Although education may in part consist of intercommunication between students, it also involves conveyance of information by teachers. Therefore, District regulation requires faculty sponsorship and control by the principal and the subject matter of the club becomes an integral part of determining its educational value.

The only purpose in sponsoring or permitting the establishment of a religious club, then, would be to further the religious education of students in a club type atmosphere. Such active sponsorship and furthering of religious education would be more than the accommodation of personal beliefs permitted in the case of *O'Hair v. Paine,* 312 F.Supp. 434 (W.D. Tex. 1969), affirmed *per curiam* 432 F.2d 66 (5th Cir. 1970), *cert. denied* 401 U.S. 955 (1971), which is cited by Petitioners. When a school district has been actively involved even to a limited degree in sponsoring a particular religious action or activity, such as Bible reading or prayer both of which are proposed by Petitioners' charter, the Court has consistently found an illegal purpose in violation of the establishment clause of the First Amendment. See, *e.g., Abington School District v. Schempp, supra; Engel v. Vitale, supra.*

B. The Primary Effect of Sponsoring Petitioners' Religious Club Would Be to Foster a Sectarian Viewpoint.

In attacking the conclusion that the primary effect in permitting this club a charter under Board Policy Number 5144 and Staff Rule Number 5144 would be to advance or inhibit religion, Petitioners refer to decisions of this Court involving the use of streets and parks for religious gatherings and ignore the fact that the challenged decision was addressing itself to a particular club under a particular charter to be approved and governed by particular policies and rules. Respondents have already discussed at length the additional involvement of the school over and above mere use of physical facilities which would result from recognizing the Bible study club. In addition, Respondents have discussed in detail how the use of a school room during school time has been repeatedly proscribed by this Court. (See *Smith v. Smith, supra* at 123 n. 6 wherein the court noted that "the expenditures of public funds in *McCollum* consisted of little more than the loan of the school classroom to religious instructors.")

Indeed, there is a vast difference in the collective use of a public park or street which is open to the general public continually, as in the case of *Saia v. New York,* 334 U.S. 558, 92 L.Ed. 1574, 61 S.Ct. 1148 (1948); *Kunz v. New York,* 340 U.S. 290, 95 L.Ed. 267, 71 S.Ct. (1951), and *Niemotko v. Maryland,* 340 U.S. 268, 95 L.Ed. 267, 71 S.Ct. 325 (1951), and the facts in the instant case which involve the use of school classrooms, during the course of the normal school day and under the direction and supervision of school personnel responsible for the safety,

conduct and education of the students involved in the religious instruction. Contrary to Petitioners' argument, the use of the classrooms is not the only basis for asserting that the effect of recognizing their religious club would be to promote religion. The California appellate court also recognized the fact that the property would be used at times when the students are required to be there (the noon hour) or take advantage of the legal requirement of attendance during the day by using the facilities immediately before and after school as part of an official school program, together with the sponsorship and other controlling factors hereinafter discussed that violate the establishment clause, 68 Cal. App. 3d at 13. As noted, contrary to Petitioners' assertion, this is not a *Zorach*-type program where religious study is held away from the high school campus. The effect of this sponsorship is to promote the particular religious viewpoint of the club members or their parents.

Furthermore, Petitioners' analysis ignores the long line of cases holding that state actions are in violation of the establishment clause where the institution or group benefited by the act are predominantly religious in nature or character. For example, in *Meek v. Pittenger, supra,* the Court noted at pages 365-66:

> "Even though ear-marked for secular purposes, 'when [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission', state aid has the impermissible primary effect of advancing religion."

See also *Committee for Public Education v. Nyquist, supra.*

In *Meek* and *Nyquist,* the Court held that even though the purpose of the state action was secular, the effect was impermissible in view of the fact that the supposed secular aid was granted to religiously oriented institutions which were further enabled to promote their particular values and ideologies. As in those cases, any purpose that the School District has in fostering clubs and interchange of ideas between students is transformed into the effect of promoting the religious ideal or theology of Petitioners when the school provides facilities and sponsorship for their club in which religion would be "pervasive". The effect of the school sponsorship and granting use of facilities is clearly one of advancing the religious beliefs of the group involved.

An additional aspect of the "effect" test also applies in the instant action. Citing *Abington School District v. Schempp, supra,* and *Engel v. Vitale, supra,* the court in *Reed v. Van Hoven, supra,* discussed this additional aspect at page 53 of its opinion. The court noted therein:

> *"It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief."* (Emphasis of the Court.)

Clearly, the sponsorship of Petitioners' Bible study club would have the ultimate or net effect of placing the official support of the school district behind the student club which, pursuant to the rules and regulations, can bear the school's name, use school facilities, use school media, and obtain numerous other special concessions from the school by reason of its "official" status. 68

Cal. App. 3d at 6-7 n.3. The effect of approving a religious club under the District's current rules would be not only to permit but to encourage a particular religious belief and as discussed hereinafter to encourage controversy and political strife among students vying for student membership, recognition and favor.

C. Recognition of Appellants' Bible Study Club Would Result in Excessive Entanglement.

The entanglement aspect of the tripartite test is relatively new. However, sufficient judicial interpretation exists to enable accurate application of that principle in the instant action. In analyzing this aspect of the test, Petitioners attempt to draw an analogy with *Zorach* and argue that supervision by school personnel is substantially similar to that of the truancy-related surveillance provisions of the *Zorach* released time program. There is nothing in the District's rules and regulations which limits a faculty sponsor to surveillance. The obvious purpose for having a faculty sponsor is not only to insure that the District fulfills its responsibility of directing the conduct of students but also to insure that the student clubs are used as a positive educational experience for students, enabling them to better perform in society. For a court to legislate district rules by holding that a "faculty sponsor" need only supervise for safety purposes and need not supervise the actual functioning of the student organization, including the direction of student discussion and studies is excessive judicial interference in the educational process and would seriously undermine the importance of having a trained educator responsible for clubs.

Even if the faculty sponsor's role were limited to mere surveillance, a problem recognized by the Court

in *Meek v. Pittenger, supra,* at page 370 would nonetheless exist. The Court stated therein:

> "The prophylactic contacts required to insure that teachers play a strictly non-ideological role, the court held necessarily give rise to a constitutionally intolerable degree of entanglement between the Church and the State. [Citation omitted.] The same excessive entanglement would be required for Pennsylvania to be 'certain', *as it must be,* that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve. [Citations omitted.]" (Emphasis added.)

See also *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

In the instant action it is naive to assume that a teacher who is willing to accept the additional responsibility of a faculty sponsorship would not be one sympathetic to the religious views of the students involved, and could refrain from actively participating in student discussions of the Bible and student prayer. In order to insure against such a problem, the District would have to develop prophylactic contacts which insure a strict neutrality on the part of the teacher, which would itself involve a certain amount of entanglement. In addition, the teacher sponsor would be the principal's agent in insuring that there was no discrimination in club membership [68 Cal. App. 3d at 6-7 n.3], and might well be involved in disputes resulting from student heckling, etc.

Additional entanglements which are ignored by Petitioners in their Petition involve club charter provisions which expressly request that the school administration

alter the charter in order to make it acceptable and guidelines under Staff Rule 5144, and California Education Code Sections 48930 *et seq.* requiring that the School District be responsible for all club funds and approval of club meetings and special activities.

An additional aspect of entanglement has recently received emphasis by the Supreme Court in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). The Court discussed therein the potential for political strife resulting from governmental entanglement in religious affairs. As recognized by the California appellate court at page 14 of its opinion, it takes little imagination to envision the conflicts which might result in the event that the District or a particular high school lacked adequate facilities to sponsor all religious clubs desiring sponsorship, or did not have a faculty member who was willing to undertake the sponsorship of a particular club, let alone the conflict which would arise as clubs poselyte for and solicit membership during school hours.

Petitioners attempt to minimize the political divisiveness which may result by asserting that the cases of *Committee for Public Education v. Nyquist, supra,* and *Lemon v. Kurtzman, supra,* involved expenditures of large sums of money. In so doing, Petitioners appear to be conceding that there would be some effect and some support of religion by the sponsorship of the club but that because the school district was not spending large sums of money, such support and effect would be permissible. Such an argument naively ignores the history so lucidly described by Mr. Justice Black in *Engel v. Vitale, supra.* tracing the growth of religious prejudice. Unfortunately, when religious beliefs are in-

volved, economic considerations are often subservient to a desire for political favors. Moreover, the argument ignores the strict and absolute application of the establishment doctrine by this Court. As stated in *Everson v. Board of Education,* 330 U.S. 1, 16, 91 L.Ed.2d 711, 67 S.Ct. 504 (1947):

> "*No tax in any amount,* large or small, *can be levied to support any religious activities or institutions, whatever they may be called,* or whatever form they may adopt to teach or practice religion." (Emphasis added.)

Whatever a school district desires, it is not in a position to sponsor a club which has the stated purpose of fostering sectarian religious views. (It is well recognized that the study of the Bible or a particular version of the Bible is sectarian and will result in religious conflict. See the expert testimony summarized in *Abington School District v. Schempp, supra,* at 209-210, and the discussion of sectarian use of the Bible by the California Supreme Court in *Evans v. Selma Union High School District,* 193 Cal. 54, 222 Pac. 801 (1924).)

The Respondent District has adopted rules and regulations governing clubs which would indicate that the District's purpose is one not only of fostering the exchange of ideas, but also using clubs as part of the pedagogical process. To force the District to restructure its rules and regulations to accommodate a religious club or to ignore those rules and regulations and their particular purpose would in and of itself be an establishment violation. The District's purpose is one of secular education and involves the use of physical facilities and faculty and is undertaken during the

school day. The education process involves those facilities and faculty members during the noon period and before and after school for "extracurricular" activities designed to foster that secular education. To include religious clubs within that program is clearly impermissible and would be a violation of the establishment clause of the First Amendment to the United States Constitution. Sponsorship of Petitioners' club not only would have the purpose and effect of furthering a particular religious doctrine but also would result in excessive entanglement between the Church and the State and potential political divisiveness as warned against by this Court. The Petitioners' club as proposed is simply not a *Zorach*-type released time program, as argued by Petitioners and rejected by the California appellate court. Rather, it has too many of the factors listed and recognized by this Court in other cases, more particularly *McCollum* and *Schempp*, to permit the District to recognize it under existing policies and regulations, and statutorially imposed duties. School district accommodation to religious feelings cannot include school sponsorship with use of school facilities during school time, supervised and aided by school faculty.

III

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Petitioners Were Not Deprived of Any First or Fourteenth Amendment Rights by Respondents' Refusal to Sponsor Their Bible Study Club.

In arguing that the California appellate court decision deprives them of First Amendment and equal protection rights, Petitioners seek to extend the analysis

of the court beyond the facts presented to it. The matter involved school sponsorship of a particular religious club under existing rules and regulations. There was no evidence in the record that Petitioners have ever been deprived of the right to meet informally and discuss religion or read the Bible on free time at school. Petitioners were only denied school sponsorship of their religious club. Petitioners' characterization of school sponsorship as mere tolerance belies the facts presented to the State appellate court. It is not a question of Petitioners being denied the right to meet and discuss the Bible, but rather a question of whether the Petitioners can force the School District to officially sponsor their club. The important matter of concern is that the School District has refused to recognize the Petitioners' religious club, just as it has refused to recognize any other religious club. Indeed, except for a short period of time, from January of 1974, until June, 1974, the District has never recognized any religious club or any club whose primary purpose was one of fostering religious thought, such as Petitioners'. 68 Cal. App. 3d at 7-8. The state appellate court therefore correctly determined that Respondents did not violate the First or the Fourteenth Amendment of the Constitution.

A. The Denial of Official Recognition to All Religious Clubs Does Not Violate Either the First or the Fourteenth Amendments.

In *Hunt v. Board of Education of County of Kanawha, supra,* a group of students were meeting on a voluntary basis prior to school, for the purpose of holding prayer. In light of school regulations and policies prohibiting the use of school buildings for religious

purposes and requiring that students be under school supervision when present at a school building, the principal of the high school at which the prayer sessions were taking place informed the students that such prayer sessions could not continue and denied the students access to any classrooms or other premises for the purpose of conducting their prayer sessions. The students sued the school authorities on the grounds that their First and Fourteenth Amendment Rights had been denied. The court, addressing these issues, stated at page 1265:

> "The present case, on the other hand, presents only two questions: First, whether the Board of Education had the authority to prohibit the use of school facilities for any religious purpose, and second, whether such prohibition is constitutionally permissible. It is my conclusion that both of these questions must be answered in the affirmative."

The court further stated at page 1266:

> ". . . I am further of the opinion that this proscription does not deny to the plaintiffs their Federal constitutional rights of freedom of speech, freedom of assembly or the free exercise of their religious beliefs. This power of school authorities to prohibit the use of a schoolhouse for religious worship is well recognized. See 47 Am. Jur. Schools § 213 at 454 and collation of authorities therein."

The court concluded that there was no invidious discrimination in view of the fact that the "Board of Education denies to anyone, regardless of sect, the use of public school property for religious purposes." 321 F.Supp. at 1266. The court also cited and quoted

from the Ohio Supreme Court decision of *State ex rel. Greisiger v. Grand Rapids Board of Education,* 88 Ohio App. 364, 100 N.E.2d 294, *cert. denied* 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 603, *rehearing denied* 341 U.S. 917, 71 S.Ct. 733, 95 L.Ed. 1342, wherein the Ohio Supreme Court basically reached the same result. See also *State Board of Education v. Board of Education of Netcong,* 108 N.J.Super. 564, 262 A.2d 21 (1970), *cert. denied* 401 U.S. 1013 (1971).

The argument that the exclusion of religious practices or religious activities on a public school campus in connection with a regular school program is a denial of First Amendment rights and unduly inhibits or hampers the religious exercise of those desiring to have such religious expression on campus has repeatedly been rejected by this Court. See, *e.g., Abington School District v. Schempp, supra,* at 225-226; *cf. Engel v. Vitale, supra,* at 434.

Although this Court has never directly passed upon the issue of whether a state agency could totally and completely exclude a certain category of speech such as religion or politics from certain public parks or places, see *Poulous v. New Hampshire,* 345 U.S. 403, 97 L.Ed. 1112, 73 S.Ct. 760 (1953) and it would appear that the Court may require some open area in the community to be preserved for outdoor assemblies, *Cox v. Louisiana,* 379 U.S. 536, 555 n.12, 13 L.Ed.2d 471, 85 S.Ct. 453 (1963), such is not an issue in this case, as there is no evidence that Petitioners have no public forum in which to meet or express their views. In fact, under the state Civic Center Act, Petitioners can use the school as a forum

after school hours and in such a manner not as to interfere with Respondents' school activities. See California Education Code Sections 40040 *et seq.; Danskin v. San Diego Unified School District,* 28 Cal. 2d 536, 171 P.2d 885 (1946). See also *Lehman v. City of Shaker Heights,* 418 U.S. 298, 41 L.Ed.2d 770, 94 S.Ct. 2714 (1974), wherein this Court held that there could be subject matter exclusion by a public agency in regulating speech in an area not regarded as a traditional public forum. In discussing what constitutes a public forum, a four-member minority cited many of the cases relied upon by Petitioners herein, but recognized that some public places are so clearly committed to other purposes that their use as public forums for communication is anomalous. 418 U.S. at 312. The minority went on to point out that the determination of whether a particular type of public property or facility constitutes a "public forum" requires the court to strike a balance between the competing interests of the government on the one hand and the speaker and his audience on the other, and noted that "the court must assess the importance of the *primary use* to which the public property or facility is committed and the extent to which that use will be disrupted if access for the expression is permitted." (Emphasis added.) Potential disruption arising out of religious conflict when there is state support has been recognized by the Court and by the State appellate court in this case as discussed. The cases indicate that the traditional public forums are parks and streets, (see *Hague v. CIO,* 307 U.S. 496, 515-516, 83 L.Ed. 1423, 59 S.Ct. 954 (1939)) which unlike a school are available to the public at all times and do not have a primary commitment to education.

B. The Ban on School-Sponsored Religious Clubs Is Justified by a Compelling State Interest.

At the onset it must be noted that the prohibition under the establishment clause of the First Amendment has been held by this Court to be absolute. See, *e.g., Zorach v. Clauson, supra,* at 312. It has also been noted that the freedom to exercise religion or "to act" as opposed to the freedom to believe, is not absolute. *Abington School District v. Schempp, supra,* at 218. More particularly, it has been held that the rights of free speech and assembly "while fundamental to our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana, supra,* at 554. There simply is no constitutional right to have a school sponsored religious gathering, as proposed by Petitioners, as part of a regular school program.

As noted by the Court in *Abington School District v. Schempp, supra,* at page 226:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

It must be remembered in the instant action that Petitioners are seeking to have their religious club not only recognized but sponsored by Respondent District. It also must be remembered that the Petitioners have not sought or been denied any use of rooms or other space at the Edison High School apart from the denial of the recognition of their club. Petitioners' argument to the effect that they are being denied the right to enter into an interchange of religious ideas during free time is not accurate. Petitioners are only being denied official sponsorship by the school. The school can only act pursuant to existing rules and regulations, and has applied those rules and regulations in an even-handed manner.[3]

In view of the fact that religious education can proceed outside of the school day without any great

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[3]No effort has been made to brief the issues raised in the Petition relating to District regulations being void for "vagueness and overbreadth" and lacking adequate "standards" in view of the fact that the issues were not adequately presented in the State court proceedings and therefore considered by the state court to be abandoned. 68 Cal. App. 3d at 8 n.7. As noted by this Court in *Whitney v. California,* 274 U.S. 357, 360, 71 L.Ed. 1095, 47 S.Ct. 641 (1926):

> "It has long been settled that this Court acquires no jurisdiction . . . unless it affirmatively appears upon the face of the record that [the federal question] . . . was presented in and expressly or necessarily decided by such state court."

See also *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, *rehearing denied* 350 U.S. 855, 100 L.Ed. 759, 76 S.Ct. 37 (1955).

In addition, Respondents have not replied to Petitioners' arguments concerning the proper application of the California Constitution. The proper application of a state law is a matter of state court interpretation. Petitioners, of course, cannot ask this Court to hold that the California court did not properly interpret and apply California law. *Bob-lo Excursion Co. v. Michigan,* 333 U.S. 28, 33, 92 L.Ed. 455, 68 S.Ct. 358 (1948).

personal harm or detriment to the Petitioners, as opposed to the great potential for harm which results from school sponsorship and involvement in religion as so often recognized by this Court in the cases discussed, the balance must weigh against requiring the school district to actively sponsor a student religious club. The great potential for favoritism and political division which was the basis for the adoption of the First Amendment amply justifies Respondents' refusal to become embroiled in religious controversy by simply precluding all religious clubs.

Conclusion.

The issue presented to the State appellate court by the stipulated statement of facts was whether the Respondents had an affirmative obligation to sponsor Petitioners' religious club. Based upon the many benefits which accrue from such sponsorship, the State appellate court correctly applied well-established precedent from this Court in concluding that such action would violate the establishment clause of the First Amendment. Certainly, the Respondents desire not to become embroiled in religious controversy by refusing to sponsor any religious club does not in any way unlawfully interfere with Petitioners' First Amendment rights to speech and association. Should Petitioners wish to pursue some form of religious training, they should exercise their rights under California Education Code Section 46014 for a *Zorach*-type released type program and have their instruction totally apart and away from the school.

Moreover, Petitioners failed to properly invoke the jurisdiction of this Court by failing to present the matter to the California Supreme Court by a timely petition for hearing.

Therefore, it is respectfully submitted that the writ of certiorari should not issue.

Respectfully submitted,

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APPENDIX A.

Rule 28. Hearing in Supreme Court.[1]

(a) [*Time within which court may grant hearing*] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period or any extension thereof the Supreme Court may for good cause extend the time for one or more additional periods not to exceed a total of an additional 60 days. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1968.

(b) [*Time for filing petition*] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is

[1]See rule 24(a). The "decision" referred to in rule 28 is the opinion or judgment of the court, not a subsequent ruling denying a rehearing, unless that ruling constitutes a modification of the judgment under rule 24(a).

denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1972.

(c) [*Time for filing answer*] An answer may be served and filed within 20 days after the decision becomes final as to the Court of Appeal. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Nov. 11, 1966.

(d) [*Form of petition and answer*]

(1) Except as provided herein, the petition and answer shall, insofar as practicable, conform to the provisions of rule 15.

(2) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

(3) The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all of his contentions in opposition to the petition. No authorities or argument may be incorporated by reference from another document into the petition, or into the answer, except that the petition or answer may incorporate by reference specified portions of a petition for hearing or answer filed in the Supreme Court by another

party in the same case, or filed in the Supreme Court in a connected case wherein a petition for hearing is also pending. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition or answer, except where such annexed material is page-numbered consecutively with the body of the petition or answer and the total length, including the annexed material, does not exceed the limit established in paragraph (4).

(4) A petition or answer shall not exceed 35 pages if printed or 50 pages if typewritten or produced by other process of duplication, exclusive of the Court of Appeal opinion, index of contents and table of authorities, and any other indices. There shall be no exhibits or appendices, however denominated, annexed thereto or filed therewith other than the opinion of the Court of Appeal and any annexed material permitted by paragraph (3), except that, if it is of unusual significance, an evidentiary exhibit or order of a lower court may be annexed if it does not exceed 10 pages. In all other instances, reference to evidentiary matters and lower court orders shall be by appropriate reference to the record, if they cannot be included in the body of the petition or answer without exceeding the length limitations previously stated. The Chief Justice may permit petitions or answers of greater length, or the inclusion of more annexed material, upon written application.

As amended, effective Nov. 11, 1966; July 1, 1975.

(e) [*Determination of petition*] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect. As amended, effective Nov. 11, 1966.

(f) [*Oral argument*] When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived.

Rule 45. Extension and Shortening of Time.

(a) [*Computation of time*] The time for doing any act required or permitted under these rules shall be computed and extended in the manner provided by the Code of Civil Procedure.

(b) [*Extension by superior court*] The presiding judge of the superior court, or a judge designated by him, for good cause shown on application made as provided in rule 43, may extend the time for doing any act involved in the preparation of the record on appeal in a civil case, prior to the expiration of such time or any valid extension thereof, subject to the following limitations: (1) he may not extend the time for payment of the fee for filing the notice of appeal; (2) extensions granted to either the clerk or the reporter for preparation of the record on appeal shall not exceed 30 days in the aggregate; and (3) extensions granted to any party shall not exceed 30 days in the aggregate, except that upon acceptance of a written stipulation

of the parties filed in the action such extensions may aggregate not to exceed 90 days. Anything in these rules to the contrary notwithstanding, the initial extension granted to any party by the superior court may be granted ex parte. A copy of any order issued under this subdivision and of the stipulation, if any, upon which it was based shall be sent forthwith by the clerk of the superior court to the clerk of the reviewing court.

As amended, effective Jan. 1, 1974; Jan. 1, 1976.

(c) [*Extension of time*] The time for filing a notice of appeal or the granting or denial of a rehearing in the Court of Appeal shall not be extended. The time for the granting or denial of a hearing in the Supreme Court after decision by a Court of Appeal shall only be extended as provided in subdivision (a) of rule 28. The time for the granting or denial of a rehearing in the Supreme Court shall only be extended as provided in subdivision (a) of rule 24.[1] The Chief Justice or Presiding Justice, for good cause shown, may extend the time for doing any other act required or permitted under these rules and may relieve a party from a default for failure to file a timely petition for hearing or rehearing or an answer thereto if the time within which the court must act on the petition has not expired. An application for extension of time shall be made as provided in rule 43. As amended, effective Jan. 1, 1951; Jan 1, 1957; Jan. 1, 1961; Jan. 2, 1962; Nov. 11, 1966.

(d) [*Shortening time*] The Chief Justice or Presiding Justice, for good cause shown, may shorten the time for serving or filing a notice of motion or other

[1]See rule 27.

paper incident to an appeal or an original proceeding in the reviewing court. An application to shorten time shall be made as provided in rule 43.

(e) [*Relief from default*] The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal. This rule is applicable to any order granting relief from default made after January 1, 1962.

Adopted, effective July 1, 1963.

Rule 46. Papers Violating Rules Not to Be Filed.

No record, brief, or other paper or document which fails to conform to the requirements of these rules shall be filed by the clerk of the reviewing court.